United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

B P/S

74-1138

To be argued by
JOHN J. KENNEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1138, 74-1139, 74-1197

UNITED STATES OF AMERICA,

Appellee,

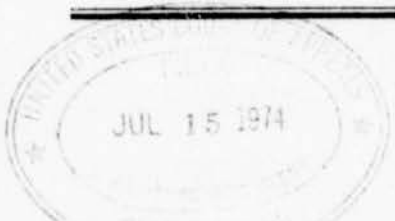
—v.—

THOMAS JOSEPH CARROLL, VINCENT McCLOSKEY, a/k/a "MIKE" and WILLIAM McCLOSKEY, a/k/a "BILLY",

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN J. KENNEY,
KENNETH R. FEINBERG,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1138, 74-1139, 74-1197

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS JOSEPH CARROLL, VINCENT MCCLOSKEY, a/k/a "MIKE" and WILLIAM MCCLOSKEY, a/k/a "BILLY",

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Joseph Carroll, Vincent McCloskey, a/k/a "Mike", and William McCloskey, a/k/a "Billy" appeal from judgments of conviction entered on January 25th, 1974, in the United States District Court for the Southern District of New York following a twelve day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

On September 11th, 1973, superseding Indictment 73 Cr. 855 was filed in three counts, charging Carroll and Vincent McCloskey (hereinafter "Mike McCloskey"), as well as John Turner, a/k/a "Jack", Chester Crawford, Paul Crawford, Terrence Dewey Myers, Geoffrey Matthews Mann, and Robert E. Rippy, a/k/a "Ripp", with violating Sections 371, 1111, 1114, and 2114, Title 18, United States Code. On

October 10th, 1973, Indictment 73 Cr. 972 was filed charging William McCloskey (hereinafter "Billy McCloskey") and Harry Johnson in the identical three counts for participating in the same crimes.* Count One charged the defendants with unlawfully conspiring to rob a United States mail truck and to jeopardize the lives of the postal employees in possession of the truck and its contents by the use of dangerous weapons. Count Two charged the murder of William Hickey, the guard in the mail truck, while Count Three charged the assault on and wounding of Crawford Lawrence, the driver of the mail truck, during the attempted robbery.

The trial of Carroll, Mike McCloskey, Billy McCloskey and Rippy began on December 10th, 1973. On December 26th, 1973, the jury returned a verdict of guilty on all three counts as to Carroll and both McCloskeys. Rippy was acquitted.**

---

* Indictment 73 Cr. 583, filed on June 14th, 1973, was superseded by Indictment 73 Cr. 606, filed on June 19th, 1973, which made technical corrections in the charging language. Indictment 73 Cr. 855, which merely deleted John Doe, a/k/a "Jack" and added John Turner, a/k/a "Jack" was joined with 73 Cr. 972 for trial on the government's motion and the consent of all parties.

** On September 17th, 1973, Mann, Myers and Chester Crawford pleaded guilty to second degree murder, a lesser included offense of Count Two of Indictment 73 Cr. 855. Paul Crawford pleaded guilty to Count One, the conspiracy count. On September 21st, 1973, Turner pleaded guilty to the conspiracy count and to assaulting a person in lawful custody of mail with the intent to steal the mail, a lesser included offense of Count Three of Indictment 73 Cr. 855. All five testified for the government at trial.

On November 11th, 1973, Harry Johnson pleaded guilty to the conspiracy count of Indictment 73 Cr. 972.

Prior to the government's consenting to the guilty plea, Myers, Mann and Chester Crawford each signed a statement, in the form of a letter to their respective attorneys, that they understood that the government would take the position at the time of sentence that it considered the offense charged most serious and deserving of a

[Footnote continued on following page]

On January 25th, 1974, the Court imposed the mandatory prison sentence provided by statute on Counts Two and Three as to the defendants Carroll, Mike McCloskey and Billy McCloskey—life imprisonment and twenty-five years. The Court also imposed a five year sentence on Count One and directed that all sentences be served concurrently. The appellants are currently serving the sentences imposed.*

Statement of Facts

A. Government's Case

(1) December, 1972, through March 11th, 1973

In December of 1972, Carroll, Mike McCloskey and Chester Crawford met with Carlton Boyd, James Dixon and Leon Rogers near South Street and Maiden Lane in Manhattan.** At that time, Boyd, who was to act as a gunman, was informed by Carroll and Mike McCloskey that the robbery of a United States mail truck was planned, that the truck would be coming from a depository bank on Maiden Lane and would have money in it. There followed subsequent meetings in New York and in New Jersey, some of which were attended by Billy McCloskey,

---

very substantial term of imprisonment. (2643a-2648a, 2658a-2659a). "a" refers to pages in appellants' joint appendix.

* On January 8th, 1974, Myers and Mann were each sentenced to twenty-five years imprisonment; Turner was sentenced to ten years imprisonment on Count Three and five years on Count One, to be served concurrently. Harry Johnson was sentenced to four years imprisonment. Paul Crawford was sentenced to a prison term of two and a half years. Chester Crawford has not yet been sentenced.

** Boyd, Dixon and Rogers were named as unindicted co-conspirators in a supplemental bill of particulars filed by the Government on December 11th, 1973. (136a). See, Rule 16(g), Federal Rules of Criminal Procedure.

at which preparations for the mail truck robbery were made. No actual attempt was made to rob the mail truck before Boyd was arrested and incarcerated on other charges on March 11th, 1973. (741-746a, 534a-539a, 1971a).

(2) March 11th, 1973 to April 5th, 1973

After Boyd's arrest, Carroll sought Chester Crawford's aid in obtaining two black gun men whose "faces" would not be known to the authorities in New York. (1711a, 1716a-1717a, 1720a-1722a).* On March 20th, Myers and Paul Crawford came to New York from Washington, D.C. and met with Chester Crawford. Chester told Myers he was working for a syndicate which wanted to pull a hold up of a mail truck. They were in need of "new faces" from out of town because the people in the organization had "faces" which were known to the authorities. (544a, 761a-763a, 886a-889a). Myers called Mann in Washington and asked him to come to New York to assist in the robbery. (764a, 890a, 1252a-1253a).

Mann arrived in New York on the afternoon of the next day. He met with Myers, Chester and Paul Crawford. The four of them went to a tavern in New Jersey where Carroll told Myers that he had been watching a mail truck for about six months. The mail truck would be carrying a large amount of money and perhaps some negotiable bonds and registered mail. Carroll stated he had someone who was able to "fence" anything of value that was on the truck. (548a-550a, 764a-766a, 892a-898a, 1722a-1725a). Before the defendants permitted Myers and

---

* It was the government's theory at trial that Carroll, Mike McCloskey, Billy McCloskey and Turner, all of whom are white, chose blacks by design, feeling that they could operate more safely and easily at the scene of the crime if the actual "robbers" were reported to be black. (338a). Chester Crawford, Boyd, Myers, Mann, Paul Crawford and Harry Johnson are all blacks. With Boyd incarcerated, the remaining white defendants sought to recruit "anonymous" faces through their contact, Chester Crawford.

Mann to join them in the heist which Mike McCloskey said they had been planning for more than a year, they first wanted to test them in a comparatively simple armed hold-up in New Jersey. 914a-915a, 1717a). Accordingly, on March 22nd, 1973, Myers and Mann seized $8200 from Rocco DiGiorgio at gun point outside the Plaza National Bank in Secaucus, New Jersey. DiGiorgio had just cashed the payroll checks of the employees of the Werner Continental Company. Co-conspirator Turner, a former employee who was familiar with DiGiorgio's routine, had identified him for Myers and Mann. (767a-772a, 918a-923a, 1311a-1316a, 1727a-1730a).

On March 23rd, Myers, Mann and Paul Crawford went to Washington. (775a, 928a-931a, 1280a). On Monday, March 26th, Myers and Mann returned to New York accompanied by Harry Johnson. (560a, 932a-934a, 1281a-1282a).*

On March 27th, and again on the 28th, Myers, Mann, Johnson and Chester Crawford met with Carroll, Turner, Mike McCloskey and Billy McCloskey at Katz' Delicatessen on Houston Street in Manhattan, where further details of the scheme were developed. At this time, Carroll stated that he had a station wagon which would be used to stop the mail truck.** (562a-570a, 935a-940a, 1292a-1297a).

---

* Mann and Myers were displeased with Paul Crawford and considered him to be unreliable. After their return to Washington on the 23rd, Mann introduced Myers to Harry Johnson. He was then invited to join their team. (1279a, 931-932a).

** This station wagon was rented from Econo-car of North Hudson, New Jersey by Eyleen Holder at the request of Mike McCloskey, her boyfriend. After it was returned, it was stolen by Mike McCloskey to be used in connection with the mail truck robbery. (1437a-1446a, 1452a-1455a, 1736a-1738a, 1742a-1743a, GX 32, 2587a-2589a). The car was subsequently left in a parking area in Pennsylvania because it was "hot" and, when found, it was towed to the rental agency from which it had been stolen. (579a, 1352a-1353a, 1453a-1454a, GX 33, 34, 1751a, 2590a-2592a). "GX" refers to government exhibits which were received in evidence at the trial.

On March 29th, and again on March 30th, the eight defendants met at Katz' Delicatessen on Houston Street in Manhattan intending to rob the mail truck on that day. It was only the last minute interference of an innocent by-stander or a chance police car in the area which caused the defendants to temporarily abandon their plan. (571a-578a, 947a-951a, 1355a-1360a).

Myers, Mann and Johnson returned to Washington on Friday, March 30th, only to return again to New York on Wednesday, April 4th, 1973. (1360a-1362a, 951a-952a).

(3) April 5th, 1973—The Robbery

On April 5th, 1973, Carroll, Turner, Mike McCloskey and Billy McCloskey again met with Myers, Mann, Chester Crawford and Harry Johnson at Katz' Delicatessen on Houston Street in Manhattan. (586a-588a, 1361a-1363a, 1789a). From there, the eight defendants went to Peck's Slip and South Street. Caroll and Billy McCloskey drove to the vicinity of the Federal Reserve Bank on Maiden Lane, observed the mail truck leaving and returned to the Peck's Slip area where they informed the others that the mail truck was on its way. 288a, 955a-957a, 1363a-1364a, 1790a-1793a, 1935a-1936a).*

Chester Crawford drove Myers and Mann to the intersection of Nassau and Beekman Streets. From there, they walked back on Beekman Street to William Street. (589a, 955a-959a, 1364a-1366a, GX 2, 2532a). Harry Johnson was in the car with Chester Crawford. 956a). Johnson and Chester Crawford were to pick Myers and Mann up after the robbery. (1936a).

---

* Upon arrival of the mail truck at Peck's Slip, it stopped at a post office giving the defendants sufficient time to prepare their ambush. (378a).

At approximately 6:00 P.M., an unmarked van, driven by Mike McCloskey with Turner seated next to him, stopped at the intersection of William and Beekman Streets.* Preceding the United States mail truck on its assigned route McCloskey halted the van just as it passed Myers and Mann who were standing on either side of the street causing the mail truck to stop abruptly behind it. (959a-961a, 1366a, 1796a). At that moment, Myers leapt to the passenger's side, forced a gun through the half open window, and shot and killed the postal guard, William Hickey. (961a-962a, 1366a, 1796a, 445a-448a, 453a-454a, 455a-450a, 464a-478a, GX 5, 5a, 2537a-2548a).** Crawford Lawrence, the driver of the mail truck, was wounded by the same bullet that killed Hickey. (380a). Mann then opened the door to the driver's side and ordered Lawrence out of the truck. Holding Lawrence by the arm, Mann directed him towards the rear doors of the van. Mike McCloskey, having heard the shot, started to drive off in the van as Mann approached it. Mann released Lawrence to knock on the van door, and in that instant instant Lawrence broke away and ran for his life down William Street. Mann fired four shots at Lawrence, piercing his clothing but not injuring him. (379a, 382a, 1367a-1368a, GX 1).***

---

* Carroll, Mike McCloskey and Turner stole the van on March 29th, 1973, from the Schwartz Yarn Company in North Bergen, New Jersey. (1371a, 1422a-1423a, 1751a-1753a, 1816a-1818a, 1887a-1889a, GX 30, 2584a).

** Myers testified that the shooting was accidental. (961a-962a).

*** Both Myers and Mann had received the pistols from Chester Crawford who stated he had received them from Mike McCloskey. (1370a). Had the attempted robbery been successful, Turner would have left the van to drive the mail truck away while Mike McCloskey would have driven the van with the guard and driver inside. (948a, 1936a). The mail truck was to be driven to a small packing plant in Linden, New Jersey owned by a man named Larry Dalia. (1970a-1971a). The record is silent as to what would become of the guard and driver except that ether would have been used to knock them out. (566a).

The robbery aborted with the firing of shots. (1796a). Mike McCloskey drove the van to the intersection of Nassau and Beekman Streets where Turner got out and boarded a New York City has headed uptown. (1797a). Myers chased the van on foot and, catching it on Frankfort Street, threatened to kill Mike McCloskey unless he waited for Mann, who was still pursuing the van on foot. (963a-964a, 1368a-1369a, 1797a-1798a).

That same evening the eight defendants met at a tavern in North Bergen, New Jersey, where Carroll cashed a check for $100, giving some of that money to Myers, Mann and Johnson so that they might spend the night in a motel before returning to Washington the next day. (597a-598a, 792a-793a, 1332a-1333a, 1341a-1343a, 1378a-1379a; GX 20, 23, 2559a, 2564a).

B. The Defense Case

None of the defendants testified or offered any evidence.

ARGUMENT

POINT I

The Court's charge to the jury was entirely correct.

Appellants urge this Court to reverse their convictions alleging that the trial Court improperly charged the jury as to the law. The various arguments raised by the appellants are dealt with below; a review of the entire charge to the jury shows that it was entirely proper and correct. (2172a-2206a).*

---

* At the outset it should be noted that not a single challenge to the Court's charge raised on appeal was made in the Court below. (2207a-2214a). Therefore, issues raised here must be tested against the standard of "plain error." None approach that level. R. 30, 52(b), F.R.Cr.P.

The appellants first argue that the Court erred in instructing the jury that the only crime which they may find the defendants guilty of under Count Two of the indictment, was murder in the first degree. (Br. 10).* This argument, that the Court erred when it did not charge the jury that it might find a defendant guilty of a lesser included offense on Count Two of the indictment, is without merit. (Br. 16-18). While the Court did not actually rule on the request to give a lesser included offense charge, rejection of such a charge would have been entirely correct.**

A lesser included offense charge is properly given only when the jury, on the evidence before it, could consistently find the defendant innocent of the greater offense but guilty of the lesser, that is, when there is a factual element of the greater crime in dispute. *Fuller* v. *United States,* 407 F.2d 1199, 1229 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1120 (1969). Similarly, there must be sufficient evidence to sustain the conviction of the lesser offense. *United States* v. *Marcey,* 440 F.2d 281, 285 (D.C. Cir. 1971). The evidence at trial demonstrated no such disputed fact either as to Count Two or Count Three.

Count Two charges first degree murder, the killing of a postal guard with malice aforethought while he was performing his duties and during the perpetration or attempted perpetration of a robbery. "Malice aforethought"

---

* "Br." refers to pages in appellants' brief.

** The request was rejected because it was submitted to the Court in an improper form. Mike McCloskey submitted 21 requests to the Court. (201a-236a). Three of those requests, nos. 15 (221a-225a), 20 (232a-233a) and 21 (234a-236a), contained 54 separate items consisting of "a conglomeration of printed material cut out and pasted together." (2016a-2019a). The Court properly refused to rule on a request of this type. The request relating to lesser included offenses appears as subdivision 9 of request 21. (235a).

is, by definition, an element of murder, first or second degree, under the statute. 18 U.S.C. 1111. Therefore, had the jury found a failure of proof on this element, it would have acquitted the defendant of any murder charge. In this case, a second degree murder verdict would have required a finding by the jury that Hickey was a postal service guard who was killed by Myers with malice aforethought while he was in the performance of his postal duties *but not during the perpetration or attempted perpetration of a robbery.* Such a verdict would, obviously, fly in the face of the evidence at trial. Nor could the trial evidence support a verdict of voluntary manslaughter, a killing committed upon a sudden quarrel or in the heat of passion, or involuntary manslaughter, a killing resulting from an unlawful but not felonious act or a lawful act committed in an unlawful manner or without due caution and circumspection. 18 U.S.C. 1112.

The appellants' argument that a lesser included offense charge should also have been given as to Count Three of the indictment is equally without merit. Count Three charged an assault on the driver of a postal truck while in custody of mail matter, with the intent to rob such mail matter, and with wounding and putting his life in jeopardy by use of a dangerous weapon in effecting and attempting to effect such robbery. 18 U.S.C. 2114. A verdict on a lesser included offense would negate the charge of wounding and putting the life of the driver in jeopardy by use of a dangerous weapon. On the evidence before it, however, the jury could not have found that Crawford Lawrence, the driver, was assaulted without finding the greater offense since the only assault in the record is by gun shot.

In fact, for the Court to give such a charge would have been error. Cf. *United States* v. *Harary,* 457 F.2d 471 (2d Cir. 1972).*

Appellants, without citing a single authority, attack the "alternate theory" charge given by the Court. (Br. 11-16, 20-22, 231a). The Court charged that the jury might find a defendant guilty of Counts Two and Three of the indictment if it found that he either aided and abetted the commission of that crime or that the crime was committed in furtherance of a conspiracy of which the defendant was a member and was an act forseeable by the defendant. The charge as given was entirely proper. (2187a-2193a). 18 U.S.C. 2, *United States* v. *Pinkerton,* 328 U.S. 640 at 645, N.6. (1946); *United States* v. *Edwards,* 366 F.2d 853, 869 (2d Cir. 1966), *cert. denied sub nom Parness* v. *United States,* 386 U.S. 919 (1967). *United States* v. *Umans,* 368 F.2d 725, 727-728 (2d Cir. 1966), *cert. dismissed,* 389 U.S. 80 (1967); *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938); (Hand, J.).

Although appellants' specific claim of error by the Court is far from clear, they apparently argue that the jury was

---

* Appellants' contention that the government is somehow estopped from denying error on this point because it has consented to pleas to lesser included offenses on both Counts Two and Three from other defendants overlooks the fact that the defendants who pled guilty to a lesser included offense never went to trial and, therefore, no evidence was presented at a trial against them which would render the plea improper. In any event, the government is free to accept a guilty plea from one defendant to part of an indictment and to try the entire indictment as returned by the grand jury against other defendants. The government's aim is to see that substantial justice is done by convicting the guilty while leaving to the Court sufficient statutory penalties so that it might be able to properly exercise its discretion in light of the crime. The record indicates that the government was able to fulfill that role in this case.

required to find the defendants had the same intent as Myers, the man who actually pulled the trigger. (Br. 13, 22). This is simply not the law. Having embarked on a plan to commit robbery—the essence of which is 'your money or your life'—all parties to the agreement are equally responsible in the eyes of the law if in the furtherance of the robbery a man is killed. *Boyd* v. *United States,* 142 U.S. 450, 455-456 (1891); *Shockley* v. *United States,* 166 F.2d 704, 715 (9th Cir 1948); See, also; *United States* v. *Greer,* 467 F.2d 1064, 1069 n. 4, (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973).*

Appellants also incorrectly claim that it was error for the Court to charge, as to Count Three of the indictment, that the jury need only find that *either* Myers or Mann wounded or placed the life of Crawford Lawrence, the mail truck driver, in jeopardy by use of a dangerous weapon. (Br. 19-20). The court properly charged in the disjunctive and the government need only prove a single substantive violation of the law. *United States* v. *Astolas,* 487 F.2d 275 (2d Cir. 1973); *United States* v. *Conti,* 361 F.2d 153

---

* Appellants contend it was reversible error for the government to fail to include a citation to Section 371, Title 18, United States Code after the second count, the murder count, in the indictment and then to request a charge to the jury that a co-conspirator may be liable for substantive crimes committed by another co-conspirator. The contention is legally erroneous. Criminal co-venturers are liable for the crimes committed by their brethren in furtherance of the joint venture under principles of agency, not conspiracy law, and the presence of a reference in the statute the indictment to conspiracy is unnecessary to the finding of vicarious liability. *United States* v. *Alsondo,* 486 F.2d 1339, 1346-1347, (2d Cir. 1973).

(2d Cir. 1966), vacated on other grounds, 390 U.S. 204 (1968).*

The Court also properly charged that Vasquez, Johnson and Dalia were not under the control of either the government or the defendants, and that since the witnesses were available to both sides, but were called by neither, the jury might infer anything it wished, or draw no inference at all. (Br. 21), *United States* v. *Ploof,* 464 F.2d 116 (2d Cir. 1972), *cert. denied sub nom Godin* v. *United States,* 409 U.S. 952 (1972); *United States* v. *Tyers,* 487 F.2d 828 (2d Cir. 1973). (2203a-2204a). These witnesses were not incarcerated and appellants make no showing they were peculiarly within the government's control. The Court offered the subpoena power to the appellants and the government offered to subpoena any witness Mike McCloskey desired.**

Appellants frivolously argue that the Court's statement to the jury that the evidence submitted at trial subject to

---

* The proof that Crawford Lawrence was wounded and his life jeopardized is overwhelming. However, the appellants also claim error in that the court failed to charge the jury must find that a .32 calibre revolver was used to wound and put the life of Crawford Lawrence in jeopardy, and that the government's proof was at fatal variance with the indictment returned by the grand jury. (Br. 19). Although the indictment charges a .32 calibre revolver was used and the evidence shows Lawrence was wounded by a .38 calibre revolver and shot at with a weapon of unknown calibre, any variance of proof is hardly prejudicial. It should also be noted that some four months before the trial, the government, in its Bill of Particulars, stated two weapons were used against Crawford Lawrence, a .38 and a .32 calibre revolver.

** It should be noted that on December 12th, the third day of trial, the government turned over to defense counsel a statement taken from Maria Vasquez. (671a). The statement amounted to a denial of any knowledge of events underlying the crimes charged. To this extent it may have been inconsistent with Chester Crawford's testimony that he used her telephone during the conspiracy. (584a). At no time during the trial, however, did any of the defendants use this fact to impeach Chester Crawford's testimony.

connection could be considered by the jury "to the effect that you give it credence in weighing the guilt or innocence of a defendant," was prejudicial because it, in effect, allowed the jury not the Court to connect it. (Br. 22). Of course, it is the Court that is required to rule on the admissibility of statements of co-conspirators which have been received subject to connection during the trial as well as to the admissibility of testimony admitted out of order or for some other reason not immediately relevant. (Br. 22). See, *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom Lynch* v. *United States*, 397 U.S. 1028 (1969). This instruction in no way gave the impression that the jury was to usurp the power of the Court; rather it simply informed the jury that, such evidence having been received, the jury could give it such weight as it deemed appropriate. (2183a).

Appellants claim error in that the Court did not charge premeditation as an element of the crime charged in Count Two of the indictment. (Br. 16, 21). "Premeditation" is not an element of first degree murder if the killing is committed in the perpetration or attempted perpetration of a robbery. 18 U.S.C. 1111.

Finally, appellants claim the Court erred in failing to give certain charges which were requested. (Br. 21-22).* A review of the errors alleged shows that this claim is without merit. Request No. 16 was withdrawn by counsel for Mike McCloskey and is therefore not considered here. (2018a). All of the other requests were denied except as charged. (2016a-2018a).

The Court pointed out that McCloskey Request No. 1 concerned informants and that none were involved in the trial of this case. (2016a).** The Court did give a standard

---

* Mike McCloskey Requests to Charge nos. 1 (201a), 4(204a), 14(220a), 16(226a) and 19(231a).

** Turner had been an informant for the Federal Bureau of Investigation but did not act in that capacity in this case. (1705a-1706a).

charge on the testimony of accomplices. (2199a-2200a). Request No. 4 was given in substance by the Court, that is, evidence that a witness has been convicted of a felony may be considered by the jury in assessing that witness' credibility. (2201a). The Court refused to give Request No. 14, which sought a charge that the jury need not accept testimony even though it may be neither contradicted nor impeached; nor was Request No. 19 given, which sought a charge that the jury may not convict the defendant Mike McCloskey unless it found beyond a reasonable doubt that he personally killed Hickey. Simply stated, Request No. 14 was clearly unnecessary while Request No. 19, as already indicated, misstates the law.

POINT II

Evidence of crimes not charged in the indictment was properly admitted at trial.

Appellants urge (Br. 30-32, 34-36) that evidence of (1) an armed robbery in Secaucus, New Jersey, and (2) the theft of a station wagon and (3) the van used in the robbery itself was unduly prejudicial and was improperly admitted at trial. Although appellants allege error predicated upon their "surprise" at trial,* as well as the prejudicial effect of the testimony, they fail to demonstrate any impropriety. In fact the evidence was properly admitted at trial on the theory that it constituted an integral part of the defendants' larger criminal venture

---

* The record reveals that, although "surprised", appellants at no time moved for a continuance.

without which a full and proper understanding of the crimes charged would not have been possible.*

Appellants correctly note that the three incidents in dispute are not properly "similar acts" offered to prove criminal intent. (Br. 35). Rather, the government's theory at all times was that they were in fact "part and parcel" of the crime charged. *United States* v. *Deaton,* 381 F.2d 114, 118 (2d Cir. 1967). The evidence relating to the Secaucus hold-up, the station wagon and the van was substantially relevant to material issues at trial. Indisputably it bore upon "the organization and structure of the conspiracy as well as the individual role played by each conspirator. . . ." *United States* v. *Statder,* 336 F.2d 326, 329 (2d Cir.), *cert. denied,* 380 U.S. 945 (1965); *United States* v. *Miller,* 478 F.2d 1315, 1318 (2d Cir. 1973), *cert. denied,* 414 U.S. 851 (1973); C.f. *United States* v. *Cohen,* 489 F.2d 945 (2d Cir. 1973). Far from being offered to show the defendants' criminal character and disposition, it presented the very means by which the conspiracy was to be executed. To exclude this evidence would have been to exclude compelling proof of the very crimes charged in the indictment. Any undue prejudice was eliminated by the Court's entirely appropriate cautionary charge. (2203a). The government cannot be blamed for introducing those means chosen

---

* Citing this evidence, appellants claim their motion for a Bill of Particulars seeking all overt acts committed in furtherance of the conspiracy (2327a) was improperly denied. (2332a). This argument is without merit. Just as the government is not required to include in conspiracy indictments notations of every overt act of which it has information, it is not required to make discoverable all the evidence of conspiracy it possesses that could technically be deemed to constitute "overt acts". *Cf. United States* v. *Lebron,* 222 F.2d 531, (2d Cir. 1955), *cert. denied,* 350 U.S. 876 (1955); *United States* v. *McCarthy,* 292 F. Supp. 937 (S.D.N.Y. 1968). Clearly the trial judge did not abuse his discretion under 7(f), F.R. Cr. P. Similarly he properly denied appellant's motion (151a) to exclude from evidence testimony relating to the Secaucus armed robbery. (524a).

by the defendants to carry out their criminal ends just because they were in themselves criminal. Clearly, the defendants chose to test their "gunmen" in Secaucus to minimize the chances of failure in New York. The testimony pertaining to the use of stolen vehicles, used so as to retain anonymity, is similarly relevant. The defendants cannot now be heard to complain that the exposure of these methods should not have been permitted by the court below.

Finally, appellants appear to argue (Br. 76-77) that because Billy McCloskey was not present during the commission of any of these three prior criminal acts, their admission was unduly prejudicial as to him. The law is to the contrary. The issue is not was Billy present, but was he a member of the conspiracy as defined by the prior criminal acts. "Thus the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof." *United States* v. *Costello,* 352 F.2d 848, 854 (2d Cir. 1965), vacated on other grounds, 390 U.S. 39, 201 (1968).

POINT III

The Court's refusal to grant a continuance requested by Mike McCloskey was entirely proper.

Mike McCloskey's claim (Br. 39-45) that the Court erred when it refused to grant his request for a continuance, made December 5th, five days before trial, is without merit.

The decision whether to grant a continuance rests within the sound discretion of the trial judge, the sole requirement being that the decision be reasonable. *United States* v. *Rosenthal,* 470 F.2d 837 (2d Cir. 1972), *cert. denied,* 412 U.S. 909 (1973). Considering all of the facts

of a particular case, reversal should be required only when the denial is so arbitrary as to violate due process. *Ungar* v. *Sarafite*, 376 U.S. 575 (1964).* A review of the underlying facts demonstrates conclusively, not only that the Court's decision was entirely reasonable, but that it was mandated by the circumstances facing the Court.**

The indictment filed on June 14th, 1973, was, for all practical purposes, the charge on which McCloskey was tried six months later.*** Donald Hopper, Esq., first appeared on Mike McCloskey's behalf on June 19th, 1973. (2660a-2666a). The Court was prepared to try the case in July or August but scheduled it for September 11th to accommodate the trial schedules of the various defense counsel. (2667a-2693a). Hopper acquiesced in this arrangement and along with other counsel, made extensive pretrial discovery motions which were decided by the Court on August 6th, 1973, in a memorandum opinion. (2324a-

---

* This is a review of a State Court case. We would argue however, that even under the supervisory power of this Court a similar standard should be applied.

** The Court filed a memorandum opinion denying McCloskey's motion for a continuance. Facts set forth here are based on that opinion except where citation is given. Op. unpub. 12/22/73 (Metzner, *J.*).

*** Indictment 73 Cr. 583 (2257a-2259a). Indictment 73 Cr. 606 (2272a-2274a) filed five days later made the following changes:

Count One, ¶ 2a added ". . . to wit, from a United States Mail Truck. . . ."

Count Two, added ". . . with malice aforethought . . ." ". . . murder" to ". . . murder and kill."

Count Three, no change.

Indictment 73 Cr. 855, filed September 11th, is identical to Indictment 73 Cr. 606 except that JOHN TURNER a/k/a "Jack" is substituted throughout for JOHN DOE a/k/a "Jack". This came as no surprise to the defendants since JOHN DOE was identified as Turner in the Government's Bill of Particulars filed in August.

2333a).* On the next day Jay Goldberg, Esq. substituted as counsel for Mike McCloskey. (2382a-2385a).

On August 6th, 1973, the Court adjourned the trial to September 17th at the request of Mr. Goldberg. (2705a-2739a). Mr. Goldberg made several more motions on behalf of Mike McCloskey which were decided by the Court. (2344a-2349a, 2393a, 2387a-2391a, 2402a-2406a, 2407a). On September 17th, the trial was again adjourned, in part because the Court found it necessary to commit Mike McCloskey for psychiatric examination. (2806a-2862a). It subsequently developed that this delay was caused by a feigned mental illness.** Carroll and Rippy, who were incarcerated in June, remained in jail.*** On October 23rd, the Court scheduled a trial date on November 26th. This date was subsequently adjourned until December 10th. In the interim Mike McCloskey's attorney, Mr. Goldberg, had commenced a trial in October which appeared likely not to end until January, 1974 or later.

Judge Metzner's own trial schedule included two criminal trials expected to last eight weeks each commencing in January, 1974 and involving a total of 35 defendants

---

* These motions, which were returnable on July 27th, 1973 were addressed to Indictment 73 Cr. 606.

** In early September, 1973, McCloskey's attorney requested a psychiatric examination and a few days later requested a second examination. (2425a-2427a, 2428a-2430a). Reports by Drs. Abrahamsen (48a) and Portnoy (50a), who were appointed by the Court, stated Mike McCloskey was deliberately faking mental illness but Dr. Portnoy felt a longer period of observation was required for him to give a definite opinion. The report from the Federal Medical Center at Springfield, Missouri stated that Mike McCloskey had freely admitted he was faking and had attempted to conceal his true mental condition. (83a).

*** Rippy was serving a sentence imposed by the Federal Court in the District of Columbia. Carroll, however, was in jail awaiting trial in lieu of $200,000 bail. Billy McCloskey remained at large on bail until ordered remanded by the Court after the return of the verdict.

and 35 attorneys. (2867a, 2898a). Accordingly, on November 19th, the Court informed Mr. Goldberg, and on November 20th, the defendant himself, that new counsel would have to be obtained since Mr. Goldberg could not try the case in December or early January and because the Court's schedule did not permit an adjournment except to the late spring of 1974, which was clearly not acceptable because co-defendants were in jail awaiting trial. (2889a-2920a).

Goldberg represented to the Court that Mike McCloskey had insufficient funds to retain new counsel and on November 27th, after confirming this fact with the defendant himself, the Court appointed Edward Panzer, Esq. who stated he would be prepared for trial on December 10th, 1973.* (2921a-2925a). On November 30th, McCloskey's family contacted John F. Martin, Esq. and he was substituted for Panzer on the express understanding that he would be prepared to try the case on December 10th, 1973.** Martin's subsequent motion for a continuance was properly denied. (2706a-2805a).

Mike McCloskey also claims that the failure to grant a continuance resulted in depriving him of effective as-

---

* Panzer was familiar with the case because he had originally been appointed by the Court to represent Rippy. Since his schedule did not permit him to try the case in early September, he was relieved. He represented Rippy only for the purpose of the plea of not guilty and bail. (2671a, 2678a-2679a, 2682a, 2685a-2686a). After he was appointed, he spent a part of two days in the United States Attorney's Office preparing himself for trial. (2786a).

** A reading of the transcripts of December 3rd and 4th shows that Martin consciously avoided making a statement to the effect that he accepted and would be ready. (2756a-2759a, 2926a-2932a). However, the Court clearly understood this to be a condition precedent to his substitution as counsel and Martin should not now be hear to argue that he made no such agreement. If he had simply refused, the Court could have allowed him to sit in with Mr. Panzer who was prepared. (2761a-2763a).

sistance of counsel in violation of his rights under the Sixth Amendment. Of course, this requires a showing by McCloskey of representation "so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and a mockery of Justice." *United States* v. *Currier*, 405 F.2d 1039, 1043 (2d Cir. 1969), *cert. denied*, 395 U.S. 914 (1969) quoting *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). Counsel on appeal does not make this claim nor could he. Cross-examination of the government witnesses by all four defendants on trial was extensive. None presented a defense of his own.* McCloskey does not now claim to have a defense.

Mike McCloskey further argues that he was not able to prepare for trial in the time allotted—December 3 to December 10. But as already indicated, Mr. Martin was substituted only with the understanding that he could be prepared for trial. In any event, the defendant does not state how he was prejudiced but simply claims "inherent prejudice." (Br. 45). It should be noted that the first day Mr. Martin appeared, the government gave his associate, Mr. Carey, complete access to its file on the case and offered to make copies available of any papers which McCloskey did not have in the Goldberg file, which he received on December 5th. Mr. Carey spent over two hours in the United States Attorney's Office on that day, reviewing this file. Martin also had a research assistant and three secretaries working for him during this period of time. (2774a, 2784a, 2787a-2788a). In short, defendant's claim that his counsel was inadequately prepared is mere wishful thinking.

---

* Mr. Goldberg, who of the four defense counsel to represented Mike McCloskey did so for the longest period of time prior to trial, stated to the Court he was prepared for trial, that he spent a considerable number of hours on the case, that he had spoken to the family, and that the defendant would neither take the stand nor call witnesses in his behalf. (2875a-2877a).

POINT IV

Mike McCloskey's statement was properly admitted into evidence without a hearing.

The appellant Mike McCloskey claims (Br. 45-47) the admission of his statements, made on November 23rd, 1973 to a Postal Inspector, without a full hearing, was reversible error. This argument lacks merit. On November 21st, 1973, Mike McCloskey went to the office of the United States Attorney accompanied by his attorney Jay Goldberg and indicated that he would agree to plead guilty to less than the entire indictment.* The government agreed to consent to a plea to second dgree murder upon the condition that Mike McCloskey would, *through his attorney,* make a full and complete statement of those criminal activities about which he could either testify or give information, and that the Government, if satisfied that such a representation was full and complete, might elicit such testimony before a grand jury. Only then, would the Government consent to the plea. If, on the other hand, the Government found that the defendant was not frank and truthful, it would not consent to a guilty plea to less than the entire indictment and would, nevertheless, use what it had learned against the defendant at any future trial. (2788a-2789a). This proposal was agreeable to both Mike McCloskey and his counsel, except that Goldberg suggested, and McCloskey agreed, that the defendant, in the absence of his attorney, should speak directly to the government attorney. (2790a).

On November 23rd, pursuant to this agreement, McCloskey was interviewed by the Assistant United States Attor-

---

* On November 27th, after the Court was advised that in fact there would be no guilty plea, Mr. Goldberg was relieved and Mr. Panzer was appointed under the Criminal Justice Act. (2921a-2925a).

ney in charge of the case in the presence of two Postal Inspectors and in his attorney's absence McCloskey made statements at this time concerning the disposition of the expected proceeds and the length of time he had been planning the robbery. (2790a-2791a). These statements were admitted against him at trial. (1970a-1971a). McCloskey, however, refused to discuss offenses not within the investigatory jurisdiction of the Postal Service with Postal Inspectors. Instead, he requested the presence of Special Agent William Kelly, Federal Bureau of Investigation.

On November 26th, Kelly and the Assistant United States Attorney in charge of the case interviewed McCloskey in the absence of his counsel. The three days between interviews were used to collect information in the government files relevant to the known and suspected criminal activity of Mike McCloskey.

On this day, Mike McCloskey signed a statement setting forth his understanding of his agreement with the government, stating that it was signed in the absence of but with the full knowledge and consent of his attorney, and that if the Government found his statements to be less than complete and truthful he knew that whatever he said could be used against him. This agreement was read to Mr. Goldberg on the telephone before McCloskey signed it. Mr. Goldberg concurred in it as representing the understanding reached, stating it was not necessary for him to be present when McCloskey signed it.

McCloskey was not interviewed on November 26th until after this agreement was signed. On the basis of the information supplied at that time, the Government refused to consent to a guilty plea to less than the indictment. (2791a-2792a, see also, 241a-247a).

Immediately before trial the defendant Mike McCloskey moved for a full hearing and suppression of these statements. This motion was denied by the Court. The Court found these statements to be completely voluntary and to have been made at a time when the defendant was adequately represented by counsel. Op. unpub. 12/22/73 (Metzner, *J.*).

The Court's ruling was entirely correct. The defendant did not dispute any fact at he hearing on this motion held on December 8th, 1973, nor does he dispute any fact now. Since there was no showing of involuntariness, there was no reason for the Court to have a full hearing.*

Appellant raises two further contentions to support his claim that his statement was improperly admitted at trial. that he was drugged at the time and that the government improperly forced his cooperation by holding out a lesser plea for his brother, Billy McCloskey. These arguments are unsupported by the record. In the first place, the suggestion that the defendant may have been under the influence of a drug is made for the very first time on appeal and is without any support in the record. The record reflects only that McCloskey was injected with sodium amyetal on November 12th, 1973—some 11 days before he made his statement to the government—for the purpose of conducting a psychiatric examination ordered by the Court and not objected to by the defendant. (83a, 2840a-2842a). Nor did the Government ever offer to allow the

---

* Simply stated defendants reliance on *Jackson* v. *Denno*, 378 U.S. 368 (1963) is misplaced because the voluntariness of Mike McCloskey's confession was never really disputed. *Miranda* v. *Arizona*, 384 U.S. 436 (1966) does not apply here since McCloskey was represented by counsel and in full awareness of his rights. Nor does *Massiah* v. *United States*, 377 U.S. 201 (1964) apply since counsel not only was aware of the nature of the inquiry but advised it and absented himself with his client's consent.

defendant Billy McCloskey to plead to a lesser offense *only* if Mike McCloskey cooperated with the Government. Although this charge is leveled in appellants' brief (Br. 45) the Court is referred to no citation.

POINT V

The evidence is sufficient to support the conviction of William McCloskey.

Appellants argue that insufficient evidence exists to sustain the conviction of Billy McCloskey. On appeal the evidence must be taken in a light most favorable to the Government. *United States* v. *Rosenthal,* 470 F.2d 837 2d Cir. 1972); *United States* v. *McCarthy,* 473 F.2d 300 (2d Cir. 1972). The evidence adduced at trial clearly shows that Billy McCloskey participated in the conspiracy from its inception, knew of its objectives, accepted them, and pursued an active conspiratorial role.

Billy McCloskey attended planning meetings with the co-defendants months in advance of the attempt to rob the mail truck, as well as meetings and "dry runs" in the weeks immediately preceding the crime. (739a, 556a, 535a-538a, 564a-565a, 568a). Indeed, he was with the conspirators when they abandoned the stolen station wagon in Pennsylvania one week before the crime. (1350a, 578a, 944a-845a).*

On March 30th, 1973, Billy McCloskey scouted the approach of the mail truck in an aborted hi-jack attempt.

---

* While it is true that neither Mann (1350a) nor Myers (944a), both of whom place Billy among the conspirators on the trip to Pennsylvania, could identify him in court, he was introduced to Mann as "Mike's brother", and Mann could recall his name as "Billy" (1350a). Myers identifies Billy on this trip only as a "young man" (943a), yet it is the same young man he sees on all other occasions. (975a). Billy McCloskey was positively identified during the trial by Boyd (379a), Chester Crawford (537a) and Turner. (1754a).

(574a-575, 1357a, 1759a). In addition, on April 5th Billy McCloskey joined the other co-conspirators at Katz' Delicatessen and then went to the vicinity of South Street and Peck Slip where the conspirators re-grouped. He was also present at a meeting of the conspirators in New Jersey a few hours after the crime. (1799a-1800a, 1375a). The unusual times and locations of these meetings, as well as their large number, compel an inference of Billy's membership in the conspiracy. *United States* v. *Calabro,* 449 F.2d 885 (2d Cir 1971), *cert. denied,* 404 U.S. 1047 (1972). The testimony shows, for example, that Billy McCloskey's part in the robbery was to stand outside the Federal Reserve Bank on Maiden Lane, spot the mail truck as it exited and alert the other members of the conspiracy that the truck had begun its route. He performed this function at least twice, on March 30th, 1973, and the date of the crime, April 5, 1973. (1784a, 1936a, 1693a, 1590).* The evidence shows that on the date of the robbery, Billy, after conferring with the other conspirators at Katz' left with them for the vicinity of Peck Slip and South Street. Billy McCloskey and Carroll then drove to the Federal Reserve Bank where Billy McCloskey observed the mail truck leaving. They returned to Peck Slip and informed the others that the truck was on its way. (1792a, 1364a).** A few hours later, Billy McCloskey attended a meeting of disheartened and disappointed conspirators at a tavern in New Jersey and relayed information (which he had heard on the radio) as to the condition of the guard and driver. (1799a-1800a, 1375a).

---

* These statements are hearsay. They are nonetheless admissible as to Billy McCloskey as a co-conspirator since the non-hearsay evidence of his membership in the conspiracy easily satisfies the test of *United States* v. *Geany,* 417 F.2d 1116 (2d Cir.), *cert. denied,* 397 U.S. 1028 (1969).

** Billy McCloskey and Carroll were to follow the mail truck to New Jersey after the successful robbery. When the robbery aborted, they became snarled in traffic. (1936a, 968a).

In the context of all the evidence in the case only an inference of complicity can be drawn. See, *United States* v. *Calabro, supra.* Billy McCloskey's involvement, first with Boyd, Rogers and Dixon and later with Myers and Mann stretches over four months. The meetings he attended had a single pursuit, the robbery of a United States mail truck, and the evidence suggests no other reason why he would have been present.

POINT VI

The admission of statements by Mike McCloskey and Rippy was entirely proper.

Appellants argue (Br. 36, 76) that the admission of defendants Rippy and Mike McCloskey's statements to postal inspectors (1220a-1224a, 1970a-1971a) violated the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968). Rippy's admission contained assertions that he had been recruited for the venture by Paul and Chester Crawford, but that he declined an active role, instead recruiting Myers. Mike McCloskey's admission was to the effect that the crime had been planned for at least a year prior to April 5th, and that the mail truck was to be driven to New Jersey once the hi-jacking was effected.

As redacted, the admissions do not inculpate either Carroll or Billy McCloskey. *United States* v. *Cassino,* 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied,* 410 U.S. 928 (1973). In any event, any prejudice to Carroll or Billy McCloskey was eliminated by the Court's appropriate limiting instructions. (1223a, 1970a) which were repeated in its charge to the jury. (2184a). In short, the admissions of Rippy and Mike McCloskey, as redacted, are well within the parameters established by this Court in *United States* v. *Trudo,* 449 F.2d 649 (2d Cir. 1971), *cert. denied,* 405 U.S. 926 (1972).

POINT VII

The Court's rulings on cross-examination of the Government's witnesses and relevance of the Government's evidence were entirely proper.

Appellants claim error was committed by the Court in its rulings during the cross-examination of the Government's witnesses. While an extraordinary number of such claims are made (Br. 48-59), a review of the record reveals they are without substance and that many are utterly frivolous.

The trial Court is permitted wide latitude in the management of the courtroom and the exercise of its discretion should not be overruled unless the Court is convinced that a ruling was clearly improper. See, *United States* v. *Blackwood,* 456 F.2d 526, 529 (2d Cir.), *cert. denied,* 409 U.S. 863 (1972). The errors relied upon here are: (1) the Court's refusal to allow continued inquiry into testimony by Turner that a Hertz-rental truck with a United States Mail sticker on it was used during one of the early trial runs (1870a-1871a); (2) the Court's inquiry as to whether Myers drank the liquor and beer he purchased all at one time (1019a)*; (3) the termination of questioning as to where Myers obtained the money to purchase a 1967 Cadillac in March of 1972, a year before his involvement in the present case (1041a); (4) the identity of the person whom Myers visited shortly before the crime was committed on April 5th (1107a);** and (5) the Court's inquiry obviously directed at clarifying questions and an-

---

*In fact, later testimony shows that on March 20th, 1973, Myers drank two cans of beer and 3 or 4 shots of scotch whiskey. (1020a-1021a).

**As it later developed, Myers was visiting a girl friend. (1502a).

swers relating to how used and worn currency is sent through the banking system. (1578a-1580a). These claims of error are patently without merit.*

Appellants' further claim that remote and unrelated evidence was admitted to the prejudice of the defendants is without merit. (Br. 37). The motel registrations which appellants refer to were identified by Myers, Mann and Johnson as having been signed by them when they stayed in the New York area during the conspiracy. (1381a-1387a, 976a-980a, GX 8-12, 15-17, 2549a-2556a). The name "R Smith" (GX 12, 2553a) which appellants claim was not related to the crimes charges (Br. 37) was identified by Myers as a name he used and as being written in his own hand. (976a).

Cecelia Duda, an employee of the Meadowlands National Bank of North Bergen, New Jersey and Ruth Dunning, an employee at the Plaza National Bank in Secaucus, New Jersey, testified, on the basis of business records, that the check of Thomas J. Carroll, Meadowlands Cab and Limousine Service, in the amount of $100, was cashed against the account of Idoyce Corporation on the morning of April 6th, 1973, the day after the attempted robbery and murder. (1325a-1347a, GX 20, 23, 2559a, 2564a). This is clearly relevant in light of the testimony that Carroll cashed a check at Idoyce tavern on April 5th, 1973, in the amount of $100 and gave the money to Myers, Mann and Johnson. (597a-598a, 972a, 1378a, 1804a-1805a).

Rocco Di Giorgio, the victim of the robbery in Secaucus, New Jersey, on March 22nd, 1973, clearly gave relevant testimony about that event. (1311a-1317a).

---

* Appellants set forth, by page citation only, a host of additional claims of error of the same nature. (Br. 58-59, 63-64). Neither singly nor taken together do these claims amount to a statement that any defendant on trial was prejudiced.

Gilbert Snowden, an employee of the New Jersey Bell Telephone Company (1403a-1406a, GX 28, 29A, 29B, 2571a-2580a), James Hand, an employee of the New York Telephone Company (1393a-1396a, GX 26, 27, 2566a-2570a) and Julius Herman Helvey, an employee of the Chesapeake & Potomac Telephone Company (1433a-1435a, GX 31, 2585a-2586a) introduced business records of telephone numbers listed to Wall's Tavern, Maria Vasquez and Linda Myers which corroborated the testimony of government witnesses that such calls were made. This demonstrated a pattern of calls made after Hickey's death. (1941a-1956a). Wall's testimony that he had a private phone in his tavern in New Jersey but that McCloskey, Carroll and Turner used it is highly relevant. (1695a-1698a).

Anthony Sagliano, Chief of the Post Office Division of the Federal Reserve Bank, and Vincent Del Principe, Record Room Supervisor of the Registry at the General Post Office in New York testified from business records as to the declared value and the contents of a part of the mail actually carried on the mail truck in which Hickey died. (1567a-1574a, GX 35-36, 2592a-2598a, 1584a-1591a, GX 37-42, 2599a-2642a, 1561a-1564a). Donald Scott Kennerson, a United States Postal Inspector, testified that a summary of those documents indicated that the value declared was $1,990,869.32. (1591a-1597a).

Joan Dietrich, of Econo-car of North Hudson, New Jersey, testified that Eyleen Holder had rented a station wagon from her which was stolen after it was returned and was subsequently located and towed back from Pennsylvania. (1437a-1455a; GX 32-34, 2587a-2591a). This highly relevant evidence corroborates Turner's testimony of the stolen station wagon the week of March 26th and the testimony of Myers, Mann, Chester Crawford and Turner that the station wagon was left in a parking area in Pennsylvania because it was "hot". (579a, 946a, 1353a, 1771a-1773a).

Jerrold Schwartz, a sales executive for the Schwartz Yarn Company, North Bergen, New Jersey, testified not only to the theft of the van used in the robbery but also gave highly relevant testimony that his company was located in the same building as the Metropolitan Adhesives Co. (1816a-1818a). Turner had testified that the van was taken from the Metropolitan Adhesives Co. (1751a-1752a). In addition, Peter Cafasso, a Detective with the North Bergen, New Jersey Police Department introduced a business record (GX 30, 2584a) which showed not only that the van had been reported missing, but that the New York Police Department had subsequently located it shortly after April 5th in the 9th precinct. (1413a-1426a). This testimony is relevant when it is noted that the southern most boundary of that precinct is Houston Street, and that after Mike McCloskey dropped Myers and Mann off on April 5th, he was seen walking without the van on the north side of that street. (1887a-1890a, 590a, 965a).

Appellant Mike McCloskey argues that it was error for the Court to exclude certain photographs which may have established there is no stop sign at the intersection of Beekman and William Streets, contrary to the government's evidence. Br. 38). The simple answer is that a picture showing that intersection from the direction that both the van and the mail truck approached on the fateful day was, in fact, received in evidence by stipulation. (2650a, 1071a, defendant McCloskey's Ex. El, See GX 2, 2532a).

POINT VIII

Carroll's claim that he was deprived of counsel is without merit.

Defendant Carroll argues (Br. 84), without citing authority, that the Court committed Constitutional error when it denied his motion, filed four days before trial, to act as co-counsel with his privately retained attorney, Michael P. Direnzo.* While this Court has long recognized a Constitutional basis for a defendant's right to defend *pro se, United States* v. *Plattner,* 330 F.2d 271 (2d Cir. 1964); *United States ex rel. Maldonado* v. *Denno,* 348 F.2d 12 (2d Cir. 1965), no court has extended this recognition to the right to act as co-counsel. The trial judge is properly afforded a wide latitude in the management of the court room. *United States* v. *Blackwood,* 456 F.2d 526 (2d Cir. 1972). Appellants neither claim nor demonstrate prejudice. The trial judge's sound exercise of discretion should not be disturbed.

Carroll also urges (Br. 83) that he was denied his Sixth Amendment right to the presence of counsel at sentencing. His attorney, Mr. Direnzo, was hospitalized and could not physically attend the sentencing. Although there is, of course, no doubt that sentencing is a "critical stage" in the criminal process, therefore entitling defendant to representation by counsel, *Gutierrez* v. *Estelle,* 474 F.2d 899 (5th Cir. 1973); *United States* v. *Johnson,* 475 F.2d 1297 (D.C. Cir. 1973); See *Mempa* v. *Rhay,* 389 U.S. 128 (1967); *Gideon* v. *Wainright,* 372 U.S. 335 (1963), it may not be realistically argued that Carroll was denied effective representation by counsel in this case. The record shows (2934a, 2938a) that the sentencing proceeded with the blessings of Mr. Direnzo, and that he joined in

---

* Mr. Direnzo is presently representing Carroll on this appeal.

all of the motions made by Mr. Martin. In addition, the Court accepted and decided motions made by Carroll pro se at the time of sentence. (294a-297a). As a practical matter, therefore, Carroll's rights were adequately protected. Mr. Direnzo's presence could have made no difference in any event, since the trial judge had no sentencing discretion at all on the murder and assault counts. 18 U.S.C. 1111, 2114. Simply stated, the defendant neither claims nor demonstrates prejudice.

POINT IX

Appellants' objections to grants of immunity to Government's witnesses are without merit.

Appellants raise (Br. 61, 68-69) a number of insubstantial procedural objections to the immunity granted defendants, Myers, Mann, Turner, Paul Crawford, and Chester Crawford in order to obtain testimony relating to the March 22, 1973, robbery in Secaucus, New Jersey.* They also argue that portions of the immunity Statute, 18 U.S.C. § 6001-6005, are unconstitutional as applied, citing the 5th Amendment. Briefly, their argument is twofold: first, that appellants have a right to have prosecution witnesses decide on a question-by-question basis when they desire to invoke their privilege against self-incrimination, and not be compelled to testify by immunity grants; and second, that due process is violated when the government can compel testimony by granting immunity, but a defendant cannot. Both arguments are utterly without merit. Appellants simply do not have standing to raise such objections. Surely, appellants have no "rights" in what the witnesses choose to do with their personal Fifth

---

* For example, appellants argue the Attorney General's letters of authorization for the immunity requests are undated and consequently the immunity granted was invalid (144a, 168a, 175a, 182a, 192a). The government, however, demonstrated to the Court and now represents it has in its possession the original letters and each is dated December 7th, 1973. (509a).

Amendment privileges and no remedy even if such rights were in fact violated. Cf. *In re Horowitz,* 482 F.2d 72, 83-87 (2d Cir. 1973). The due process argument is equally without merit, for ". . . nowhere in the Constitution do we find any justification for conditioning the Government's ability to grant immunity on a corresponding grant to private individuals." *In re Kilgo,* 484 F.2d 1215, 1222 (4th Cir. 1973).

POINT X

Other claims raised by appellants are entirely without merit.

Appellants argue that the Court's failure to prevent mingling of jurors with other persons outside the courtroom and to make the incarcerated defendants more accessable to counsel are reversible errors. (Br. 62). The Court was aware of these problems throughout the trial and took steps to correct them. (353a-354a, 777a-782a). No prejudice to the defendants is claimed or demonstrated.

Appellants' also claim error in the Court's voir dire of the jury panel citing the dismissal of two jurors at the outset of the trial and their replacement by alternate jurors. (Br. 59). It is clear that juror No. 2 failed to answer a direct question on the Court's inquiry and was dicharged for that reason. (363a-364a). Juror No. 6 informed the Court after he was impanelled that he had some legal education and, indeed, had brought sveral Court actions on his own behalf. (365a-366a). This juror was discharged by the Court on the application of the defendant Rippy which was joined in by the government. (368a). No defendant objected to the dismissal of either juror. The Court thus acted entirely properly. *United States* v. *Floyd,* — F.2d — (2d Cir. April 25th, 1974), Dkt. Nos. 73-1957, 73-1969, 73-2009, 73-2225, at pp. 3036-3037. Again no preju-

dice of any kind is either claimed or shown and, certainly, this does not amount to plain error. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966); R. 52(b), F.R. Crim. Proc.

Appellant Billy McCloskey argues that the identification of his Post Office personnel file was reversible error. (Br. 63, 77). This argument is without merit. The file was merely marked for identification and identified. The government made an offer of proof out of the hearing of the jury that it would show that Billy McCloskey was employed at the General Post Office in New York in October of 1971, and that truck driven by Crawford Lawrence originated at that point. The Court sustained the defendant's objection and admonished the jury not to speculate as to what the file ". . . shows or what it means or what it says." (432a-439a). Prejudice to Billy McCloskey, if any, was minimal land was cured by the Court's instruction.

Billy McCloskey's claim that he was prejudiced by Mr. Hopper's failure to make motions addressed to Indictment 73 Cr. 972 is entirely frivolous. The Indictment was identical in content to Indictment 73 Cr. 606 to which Mr. Hopper had addressed substantial motions. (2324a-2333a), See, *United States* v. *Sanchez,* 483 F.2d 1052, 1057 (2d Cir. 1973).

Appellants claim the statements made by Rippy in furtherance of the conspiracy should have been stricken and cite as proof the fact that Ripply was acquitted on the conspiracy count by direction of the Court. (Br. 38). This argument is answered by simply stating that, without conceding its merit, Rippy made no statement about which evidence was heard at trial which inculpated or was prejudicial to any of the defendants at trial.

Appellants' argument (Br. 87-88) that the indictment was not properly signed by the foreman of the grand jury and that when this alleged defect was raised the Court should have held a hearing is utterly without merit. (449a-453a, 3036a-3042a).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN J. KENNEY,
KENNETH R. FEINBERG,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1974— 614—204—384—74

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York }
County of New York }

Annabelle Cheney being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15 day of July 1974 he served a copy of the within by placing the same in a properly postpaid franked envelope addressed: Michael P. DiBenzo, Esq 15 Columbus Ave, NY NY 10023

John F. Jordan, Esq 342 Madison Ave NY NY 10017

Louis F. Mascara Esq 38 W. Fourth Street Huntington NY 11743

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Annabelle Cheney

Sworn to before me this

15 day of July '74

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975